

72 FLRA No. 125

NATIONAL LABOR RELATIONS BOARD
(Agency)

and

NATIONAL LABOR RELATIONS BOARD
PROFESSIONAL ASSOCIATION
(Union)

0-AR-5577

0-AR-5620

DECISION

January 27, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and James T. Abbott, Members
(Chairman DuBester concurring; Member Abbott
concurring)

I. Statement of the Case

In this case, we affirm that § 7116(d) of the Federal Service Labor-Management Relations Statute (the Statute)¹ is applied to grievances on an issue-by-issue basis.

The Union filed a grievance concerning the Agency's termination of the parties' collective-bargaining agreement and failure to participate in a detail program for employees. Arbitrator James M. Harkless issued two arbitrability awards finding that some issues raised in the grievance were barred under § 7116(d) by a previously filed unfair-labor-practice (ULP) charge. Because the other issues raised in the grievance had not been raised in the ULP charge, the Arbitrator ruled that those issues could proceed to arbitration on the merits.

The Agency filed interlocutory exceptions to both awards on contrary-to-law and essence grounds. Because the Agency's exceptions rely upon an erroneous interpretation of § 7116(d), and the Agency fails to otherwise establish that the award is deficient, we deny the Agency's exceptions.

¹ 5 U.S.C. § 7116(d).

II. Background and Arbitrator's Awards

On August 8, 2018, the Agency notified the Union that it would be terminating the parties' agreement, and electing to bargain a new one, once the agreement expired on October 8, 2018. Prior to the agreement's expiration, the Agency also notified the Union that, upon expiration of the agreement, it would no longer be bound by several contract provisions concerning permissive subjects of bargaining. The Agency then identified various sections of Article 28, which covered the parties' detail program, as permissive. As relevant here, the Agency informed the Union that it would no longer offer "a minimum of six (6) field [detail] assignments and six (6) Headquarters assignments . . . each year," under Section 28.2(a);² abide by Section 28.2(b)'s requirement that details be distributed evenly across participating Agency components;³ or adhere to Section 28.3(d), which provided that the detail program year "shall coincide with the Agency's fiscal year."⁴

On November 6, 2018, the Union filed a ULP charge with the Federal Labor Relations Authority's (FLRA's) Washington Regional Office asserting that the Agency failed to notify the Union of its intent to terminate the parties' agreement at least sixty days in advance of the agreement's expiration date. Around this time, and also after the parties' agreement had expired, the Union attempted to arrange detail assignments for six bargaining-unit employees. The Agency discussed detail arrangements with the Union but, ultimately, did not grant any detail requests. Consequently, approximately three months after the ULP charge, the Union filed a grievance alleging that the Agency: (1) violated Article 28, Sections 28.2(a) and (b) by not offering details; and (2) did not fulfill its obligation to "make 'every reasonable effort' to arrange details before or early in the fiscal year," under Article 28, Section 28.3(c) (Section 28.3(c)).⁵ The Agency denied the grievance and the Union invoked arbitration.

On April 10, 2019, the FLRA dismissed the Union's ULP charge. Following the dismissal, the parties notified the Arbitrator that they would be proceeding to arbitration on the issue of arbitrability before addressing the merits of the grievance. At arbitration, the Arbitrator

² 0-AR-5620, Award (Award) at 10 (quoting Collective-Bargaining Agreement (CBA), Art. 28, § 28.2(a)).

³ See *id.* (stating "details shall be allocated, (1) field detail and one (1) Headquarters detail to each Board staff and to the Office of Representation Appeals" (quoting CBA, Art. 28, § 28.2(b))).

⁴ *Id.* at 12 (quoting CBA Art. 28, § 28.3(d)).

⁵ *Id.* at 4-5.

framed the issues as follows: “Is the [parties’ agreement] . . . still in effect? Has the [A]gency breached the [parties’ agreement] . . . by failing to grant details through the [A]gency’s detail program, or adequately explain the denial of such details?”⁶

The Arbitrator issued an initial award in which he found that Article 10, Section 10.3(e) (Section 10.3(e)) of the parties’ agreement barred only part of the Union’s grievance. Section 10.3(e) provides, in relevant part, that “issues which can be raised under this grievance procedure or as an unfair labor practice [under 5] U.S.C. § 7116, may, in the discretion of the aggrieved party, be raised under this grievance procedure or as an unfair labor practice under 5 U.S.C. § 7116, but not under both procedures.”⁷ The Arbitrator noted that Section 10.3(e) incorporates “the statutory standard in 5 U.S.C. § 7116(d) on election of remedies.”⁸ The Agency filed exceptions to this award on December 11, 2019, and the Union filed an opposition.⁹

On March 18, 2020, the Arbitrator served the parties with a second award that expanded on the findings, and explained the reasoning, from the first award. In the second award, the Arbitrator found that the Union’s grievance raised “the same basic issue” as the ULP – whether the Agency properly terminated the parties’ agreement, including the permissive sections in Article 28.¹⁰ Applying Section 10.3(e), the Arbitrator determined that the ULP charge barred the Union from grieving the Agency’s alleged failure to “provide [bargaining-unit] employees with the opportunity to undertake details[] under the *terminated* [sections] in Article 28.”¹¹ However, the Arbitrator also found that the ULP charge did not bar the portion of the grievance alleging that the Agency violated Section 28.3(c) – an expired section that continued in effect because the Agency did not identify it as permissive.¹² Accordingly,

the Arbitrator ruled that the grievance was arbitrable, in part, on the issue of whether the Agency violated Section 28.3(c) by failing to consider detail requests or to explain the delay in announcing the detail program.

On April 17, 2020, the Agency filed exceptions to the second award¹³ and a motion to consolidate its two sets of exceptions.¹⁴

III. Preliminary Matter: The Agency’s exceptions are interlocutory but extraordinary circumstances warrant considering the exceptions.

The Agency concedes that its exceptions to both awards are interlocutory.¹⁵ The Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all issues submitted to arbitration.¹⁶ However, the Authority has held that any exception which would advance the ultimate disposition of the case by obviating the need for further arbitral proceedings presents an “extraordinary circumstance” warranting review.¹⁷

Here, the Agency asserts that the Arbitrator should have found that the entire grievance was either barred by the earlier-filed ULP charge or was procedurally inarbitrable based on the Agency’s termination of the parties’ agreement. Because resolution of the Agency’s exceptions could conclusively determine

of, or early in, [the fiscal] year[,]’ [a]nd Section 28.4(a) setting out the eligibility criteria for a detail assignment.” *Id.* at 35-36.

¹³ The Authority docketed the Agency’s exceptions to the second award under Case No. 0-AR-5620.

¹⁴ The Agency filed a motion to consolidate its two sets of exceptions, and the Union did not oppose the motion. Because these cases involve the same parties and arise from the same arbitration, we grant the Agency’s unopposed motion. *See U.S. Agency for Glob. Media*, 70 FLRA 946, 946 (2018) (then-Member DuBester dissenting) (reviewing exceptions to an arbitrator’s first and second awards in a single decision).

¹⁵ 0-AR-5620, Exceptions Br. at 9-10; 0-AR-5577, Exceptions Br. at 8.

¹⁶ *U.S. Dep’t of Educ., Fed. Student Aid*, 72 FLRA 316, 316 (2021) (Chairman DuBester concurring) (citing 5 C.F.R. § 2429.11; *U.S. Dep’t of the Army, Army Corps of Eng’rs, Norfolk Dist.*, 71 FLRA 713, 713 (2020) (then-Member DuBester concurring)).

¹⁷ *U.S. Dep’t of the Army, Nat’l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522, 523 (2020) (*Fort Irwin*) (then-Member DuBester dissenting) (citations omitted); *U.S. Dep’t of Educ.*, 71 FLRA 516, 517-18 (2020) (then-Member DuBester concurring).

⁶ *Id.* at 1.

⁷ *Id.* at 22 (quoting CBA, Art. 10, § 10.3(e)).

⁸ *Id.* at 23.

⁹ The Authority docketed the Agency’s exceptions to the first award under Case No. 0-AR-5577.

¹⁰ Award at 25.

¹¹ *Id.* at 27 (emphasis added).

¹² The Arbitrator noted that “Article 28 continued to contain other provisions which the Agency did not terminate. They included Section 28.2(d), under which the Agency had announced in September the availability of details for the upcoming fiscal year and six employee[s] had applied; Section 28.3(b) stating in part that: ‘Selection of details . . . will be made by the Board after receiving recommendations from the Exchange Program Committee’; Section 28.3(c) stating in part: ‘To the extent practicable, every reasonable effort will be made . . . to arrange for details in advance

whether further arbitration is necessary, we grant interlocutory review.¹⁸

IV. Analysis and Conclusions

A. The award is not contrary to § 7116(d) of the Statute.

The Agency argues that the award is contrary to § 7116(d) of the Statute because the Arbitrator should have dismissed the grievance in its entirety rather than in part.¹⁹ Specifically, the Agency contends that § 7116(d) “prohibited” further arbitration “as a matter of law” once the Arbitrator found that Section 10.3(e) barred him from considering whether the Agency violated any provision of the agreement that was no longer in effect after the agreement expired.²⁰ In support of this argument, the Agency asserts that “Section 10.3(e) parallels § 7116(d),” and, therefore, the Arbitrator had to “interpret the contract consistent with Authority precedent interpreting [§] 7116(d).”²¹

The Authority reviews questions of law de novo.²² In conducting a de novo review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law.²³ When an arbitrator’s award relies on a contractual provision that “reiterates” or “parallels” a provision of the Statute, the Authority does not apply the essence standard but, instead, “will exercise care to ensure that the [Arbitrator’s] interpretation is consistent with the Statute, as well as the parties’ agreement.”²⁴ Because the Arbitrator relied on Section 10.3(e), a provision that parallels § 7116(d) of the Statute, in making his arbitrability ruling, we review the award to determine whether it is consistent with § 7116(d).²⁵

Section 7116(d) of the Statute provides that “issues which can be raised under a negotiated grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice, but not under both procedures.”²⁶ To determine whether the issues involved in a ULP charge and a grievance are the same, the Authority examines whether: (1) the ULP charge and the grievance arose from the same set of factual circumstances, *and* (2) the theories advanced in support of the ULP charge and the grievance were substantially similar.²⁷ When applying § 7116(d), the Authority evaluates the individual issues raised in a grievance, not the grievance as a whole.²⁸ Thus, when § 7116(d) bars an issue, the arbitrator can still consider any issues remaining that are not similarly barred.²⁹

Here, the Arbitrator applied Section 10.3(e) on an issue-by-issue basis in finding that one of the grievance issues, whether the Agency violated terminated permissive provisions of the parties’ agreement, was barred by the Union’s earlier-filed ULP charge.³⁰ But the Arbitrator also found that the other grievance allegations – that the Agency violated Article 28 by failing to either consider detail requests or explain the delay in announcing the detail program³¹ – raised issues not contained in the ULP charge.³² Therefore, the Arbitrator concluded that the ULP charge barred the Union’s allegations related to the sections of Article 28 that the Agency terminated as permissive, but did not bar the grievance’s allegations concerning Section 28.3(c).³³

The Agency does not contend that Section 28.3(c) was raised in the ULP. Instead, it argues that once the Arbitrator found that one grievance is sue

¹⁸ See *Fort Irwin*, 71 FLRA at 523 (granting interlocutory review where resolving the exceptions could render the grievance inarbitrable and thus avoid the need for further arbitration).

¹⁹ 0-AR-5620, Exceptions Br. at 10-12. On this same basis, the Agency also argues that the award fails to draw its essence from Section 10.3(e). *Id.*

²⁰ *Id.* at 11.

²¹ *Id.* at 10.

²² *U.S. Dep’t of the Air Force, Edwards Air Force Base, Cal.*, 72 FLRA 168, 170 n.16 (2021) (Chairman DuBester concurring) (citing *Bremerton Metal Trades Council, Int’l Brotherhood of Boilermakers, Loc. 290*, 71 FLRA 1033, 1034-35 (2020) (*Loc. 290*)).

²³ *Id.* (citing *Loc. 290*, 71 FLRA at 1035).

²⁴ *AFGE, Loc. 1045*, 64 FLRA 520, 521 (2010) (quoting *NFFE, Loc. 2010*, 55 FLRA 533, 534 (1999)).

²⁵ *Id.*

²⁶ 5 U.S.C. § 7116(d).

²⁷ *U.S. Dep’t of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 512, 514 (2018) (*Navy*) (then-Member DuBester dissenting).

²⁸ See *U.S. DOD, Marine Corps Logistics Base, Albany, Ga.*, 37 FLRA 1268, 1271-75 (1990) (applying § 7116(d) of the Statute to two grievance issues on an individual basis).

²⁹ *Id.* at 1274-75 (holding that § 7116(d) of the Statute did not prevent the arbitrator from considering a grievance issue even though § 7116(d) barred a second issue raised in the same grievance).

³⁰ Award at 25-27.

³¹ *Id.* at 4-5.

³² *Id.* at 28.

³³ *Id.* (finding that the grievance was not barred in its entirety by the earlier-filed ULP because the Union, in addition to raising claims under terminated provisions of Article 28, alleged independent violations of “provisions in Article 28 which the Agency did not terminate[.]” including “Section 28.3(c)”).

was already raised by the ULP, “law” dictated that the Arbitrator dismiss the entire grievance.³⁴ As noted above, § 7116(d) operates to bar only the portions of a grievance that “are the same” as those in an earlier-filed ULP.³⁵ Thus, the Agency’s argument provides no basis for finding the award contrary to § 7116(d) of the Statute, and we deny this exception.³⁶

B. The award does not fail to draw its essence from the parties’ agreement.

The Agency argues that the award fails to draw its essence from the parties’ agreement because the Union cannot raise a meritorious claim under the sections of Article 28 that the Agency did not terminate, such as Section 28.3(c).³⁷ According to the Agency, the Arbitrator failed to recognize that the expired but still-in-effect sections of Article 28 that concern details are unenforceable because they are dependent on other terminated sections of Article 28.³⁸

In the second award, the Arbitrator found that certain sections of Article 28 remained in effect after the expiration of the agreement because the Agency did not notify the Union that they were permissive.³⁹ Further, the Arbitrator held that the Union could grieve violations of these remaining sections notwithstanding the Agency’s termination of other sections within the same article.⁴⁰ As an example, he stated that the Union could grieve the Agency’s failure to make a reasonable effort to timely announce the detail program and arrange details, or explain its delay in doing so, under Section 28.3(c).⁴¹

³⁴ 0-AR-5620, Exceptions Br. at 11.

³⁵ *Navy*, 70 FLRA at 516.

³⁶ Although unnecessary, we find that the grievance’s allegation that the Agency violated Article 28 by failing to consider detail requests or timely announce the detail program does not involve the same issue raised in the Union’s earlier-filed ULP charge. The ULP alleged that the Agency violated the Statute by failing to provide timely notice of its intent to terminate the parties’ now-expired agreement. The grievance, on the other hand, alleged that the Agency violated sections of Article 28, particularly Section 28.3(c), that remained in effect after the agreement expired because the Agency did not identify them as permissive. This grieved issue is specific to the detail program and concerns alleged contractual, rather than statutory, violations. In addition, the outcome of the ULP charge could *not* moot this aspect of the grievance, because the parties were bound by Section 28.3(c) regardless of whether the Agency timely terminated the expired agreement.

³⁷ 0-AR-5620, Exceptions Br. at 12. When reviewing an arbitrator’s interpretation of a collective-bargaining agreement, the Authority will find that an arbitration award is deficient as failing to draw its essence from the agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *AFGE, Loc. 3369*, 72 FLRA 158, 160 (2021) (citing *U.S. Dep’t of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017); *U.S. Dep’t of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 104 & n.13 (2019)).

³⁸ 0-AR-5620, Exceptions Br. at 12.

³⁹ See *supra* note 12.

⁴⁰ See Award at 38 (concluding that the grievance was arbitrable to the extent it raised claims under expired sections of Article 28 “which remain[ed] after the Agency terminated the permissive provisions in that Article”).

⁴¹ *Id.* at 28 (finding that the grievance alleged violations of expired contract provisions that the Agency did not terminate, including Article 28, Section 28.3(c)).

By asserting that the Union's grievance cannot be sustained *on the merits*,⁴² the Agency's exception merely speculates as to how the Union would present its case in future arbitral proceedings. Such an exception does not demonstrate that the Arbitrator's interpretation of Article 28 was deficient. Consequently, the Agency's exception constitutes nothing more than a disagreement with the Arbitrator's procedural-arbitrability findings and, therefore, does not establish that the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement.⁴³ Accordingly, we deny the Agency's essence exception.⁴⁴

V. Decision

We deny the Agency's exceptions.

Chairman DuBester, concurring:

For reasons expressed previously, I continue to disagree with the majority's expansion of the grounds upon which the Authority will review interlocutory exceptions.¹ In my view, interlocutory review is warranted when exceptions raise a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case.²

Applying this standard, I agree that the Agency's exceptions present extraordinary circumstances warranting interlocutory review.³ I also agree that the award is not contrary to § 7116(d), and that it does not fail to draw its essence from the parties' agreement.

Accordingly, I concur.

⁴² 0-AR-5620, Exceptions Br. at 12 (arguing that "if the [Union] arbitrated the grievance on the remaining provisions . . . it would be required to rely on the expired provisions" that the Agency terminated).

⁴³ See *U.S. Dep't of VA*, 72 FLRA 194, 197 n.36 (2021) (Chairman DuBester dissenting) (denying essence exception that "merely disagree[d]" with the arbitrator's interpretation of the agreement as to procedural arbitrability); *SSA*, 71 FLRA 580, 581 (2020) (then-Member DuBester concurring).

⁴⁴ To the extent the Agency argues that the Arbitrator wrongfully distinguished the expired sections of Article 28 from the terminated permissive sections of that same article, we reject the Agency's argument as inconsistent with the Statute and Authority precedent. See *Indep. Union of Pension Emps. for Democracy & Just.*, 68 FLRA 999, 1004 (2015) (affirming that "when a negotiated agreement expires, personnel policies, practices, and matters affecting working conditions continue to the maximum extent possible" unless the parties reach an agreement to the contrary or modify the expired terms).

¹ See *U.S. Dep't of VA, Veterans Benefits Admin.*, 72 FLRA 57, 62 (2021) (Dissenting Opinion of Chairman DuBester) (citing *U.S. Dep't of the Treasury, IRS*, 71 FLRA 192, 195 (2019) (Dissenting Opinion of then-Member DuBester)).

² *U.S. Dep't of the Army*, 72 FLRA 363, 369 (2021) (Member Abbott concurring) (Dissenting Opinion of Chairman DuBester).

³ See, e.g., *NLRB*, 72 FLRA 80, 81 (2021) (Member Abbott dissenting) (granting interlocutory review where exception alleged plausible jurisdictional defect based on § 7116(d)).

Member Abbott, concurring:

I agree with the majority; however, I write separately to emphasize portions of the record that distinguish this case from previous cases involving § 7116(d) of the Federal Service Labor-Management Relations Statute.

On October 5, 2018, the Agency informed the Union that “[it] will unilaterally terminate the provisions containing permissive subjects upon expiration of the [parties’ agreement].”¹ On October 12, 2018, the Agency provided an exhaustive list of provisions it deemed permissive, and as such, would no longer follow with the expiration of the parties’ agreement.² That exhaustive list did not include Article 28, Section 28.3(c).³ On November 6, 2018, the Union filed an unfair-labor-practice (ULP) charge against the Agency, alleging “the Agency has failed to bargain in good faith by failing and refusing to provide . . . documentation reflecting a vote by the [National Labor Relations] Board to terminate the [parties’] agreement.”⁴ As found by the Arbitrator, the ULP charge concerned whether the Agency properly terminated the parties’ agreement, including permissive sections in Article 28.⁵

While this was ongoing, the Union and Agency met on October 2, 2018, to discuss details.⁶ On October 31, 2018, the Union and Agency communicated via email regarding the details.⁷ On November 20, 2018, December 17, 2018, and January 2, 2019, the Union emailed the Agency asking for an update on the details.⁸ On January 8, 2019, the Agency responded that it was still reviewing the detail requests.⁹ On January 16, 2019, the Union emailed the Agency asking “what the hold-up”

was on the approval of the details.¹⁰ On January 30, 2019, the Union filed the instant grievance alleging that the Agency was violating Article 28, Sections 28.2 and 28.3 by failing to make every reasonable effort to award the details in a timely manner.¹¹ As found by the Arbitrator, the surviving issue in the grievance was whether the Agency violated Article 28, Section 28.3(c), which was not a terminated permissive provision.¹²

In my view, these key facts distinguish this case from the previous case where I dissented, arguing that § 7116(d) applied.¹³ The surviving issue contained in the grievance – whether the Agency violated Article 28.3(c), *which was not terminated by the Agency and therefore still binding on the parties* – does not arise from the same factual circumstances¹⁴ as the ULP, which involves the Agency’s actions in terminating the permissive

¹ 0-AR-5577, Exceptions, Ex. 2, Agency Procedural-Arbitrability Mot. (Ex. 2), App. at 15, October 5, 2018 Letter at 1.

² 0-AR-5577, Exceptions, Ex. 2, Agency Procedural-Arbitrability Mot., App. at 21-22, October 12, 2018 Letter (October 12, 2018 Letter) at 1-2 (identifying Art. 16, § 16.3, Art. 16, § 16.5, Art. 19, § 19.1(a), Art. 19, § 19.2(a), Art. 19, § 19.3(a), Art. 27, § 27.3(a), Art. 28, § 28.2(a), Art. 28, § 28.2(b), Art. 28, § 28.2(c), Art. 28, § 28.2(e), and Art. 28, § 28.3(d) as permissive provisions that terminated at the expiration of the parties’ agreement).

³ *Id.*

⁴ Ex. 2, App. at 25, November 6, 2018 ULP Charge at 1.

⁵ 0-AR-5620, Award (Award) at 25.

⁶ 0-AR-5577, Exceptions, Ex. 3, Union Opp’n to Agency Procedural-Arbitrability Mot. (Ex. 3) at 7-8.

⁷ *Id.* at 8.

⁸ *Id.* at 9.

⁹ *Id.* at 10.

¹⁰ *Id.*

¹¹ Ex. 2, App. at 30-32, Union Step-Two Grievance at 1-3.

¹² Award at 35-36; *see also* Ex. 3 at 3 (striking though a portion of Art. 28, § 28.3(d), but leaving Art. 28, § 28.3(a), (b), (c), (e), and (f) untouched).

¹³ *See DHS, U.S. CBP, Laredo, Tex.*, 71 FLRA 1069, 1076-78 (2020) (Dissenting Opinion of Member Abbott) (concluding that the earlier-filed grievances and the later-filed ULP charge both arose from the same set of factual circumstances – allegations of ongoing discrimination, retaliation, and harassment based on union activity from a supervisor over a seven week period – because both “arise out of the same time frame, the same parties, and the same ongoing dispute”).

¹⁴ *See U.S. Dep’t of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 512, 514 (2018) (then-Member DuBester dissenting) (To determine whether the issues involved in a ULP charge and a grievance are the same for purposes of § 7116(d), the Authority examines whether: (1) the ULP charge and the grievance arose from the same set of factual circumstances, and (2) the theories advanced in support of the ULP charge and the grievance were substantially similar.).

provisions of the parties' agreement.¹⁵ As such, the issue of whether the Agency violated Article 28.3(c) is not barred by the earlier-filed ULP charge.¹⁶

While I sympathize with the Agency's assertion that the grievance is impractical because Article 28.3(c) must inherently rely on terminated provisions,¹⁷ the Agency *chose* not to terminate Article 28.3(c), and therefore, is still bound by that provision. Simply put, the Agency must now face the consequences of its – in my view – faulty decision to terminate only one provision of Article 28.3.¹⁸

¹⁵ See *U.S. Dep't of Educ.*, 72 FLRA 203, 205 (2021) (Chairman DuBester concurring) (finding that § 7116(d) did not bar the later-filed grievances because they did not arise from the same set of factual circumstances or advance substantially similar legal theories). But see *NTEU*, 72 FLRA 423, 427-28 (2021) (Member Abbott concurring; Chairman DuBester dissenting) (finding that § 7116(d) barred the later-filed grievance because it arose from the same set of factual circumstances – negotiations over a new collective-bargaining agreement – and advanced similar legal theories as the earlier-filed ULP); *U.S. Dep't of VA*, 71 FLRA 785, 786 (2020) (then-Member DuBester dissenting) (finding that the ULP charge and the grievance arose from the same set of factual circumstances – the agency's removal of the local president from 100 percent official time).

¹⁶ I note that this outcome would occur under the “substantially similar factual circumstances” standard I advocated for in *NLRB*. See 72 FLRA 80, 83 (2021) (Dissenting Opinion of Member Abbott) (advocating for “the Authority should no longer require the *same* [set of] factual circumstances, but apply the *substantially similar* standard for both prongs”). Here, the factual circumstances are not substantially similar because the ULP arose from the Agency's decision to terminate provisions it identified as permissive in October 2018; whereas the grievance arose from the Agency's alleged violation of a provision it *did not terminate*.

¹⁷ 0-AR-5620, Exceptions Br. at 12 (arguing that “if the [Union] arbitrated the grievance on the remaining provisions . . . it would be required to rely on the expired provisions” that the Agency terminated).

¹⁸ October 12, 2018 Letter at 2 ((identifying a portion of Article 28, Section 28.3(d) as a permissive provision that terminated at the expiration of the parties' agreement); Ex. 3 at 3-4 at 70-71 (striking though a portion of Art. 28, § 28.3(d), but leaving Art. 28, § 28.3(a), (b), (c), (e), and (f) untouched).